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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956 1957

No. 408

HENRIETTA KREAM,
Petitioner,

v.

PUBLIC SERVICE COORDINATED TRANSPORT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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1. The petitioner's award for the death of her husband has been taken away from her without due process of law and in respect thereto she has been denied the equal protection of the laws, both guaranteed to her by the first section of the 14th Amendment to the Constitution of the United States and this deprivation of her constitutional rights can only be remedied by the issuance of the writ of certiorari herein applied for.

2. The order made by the Supreme Court of New Jersey on June 24, 1957, denying a rehearing to the petitioner on the said constitutional questions, and denying her an opportunity to be heard with regard to the new matter on which it based its decision and judgment on its asserted ground that rehearing was denied because no member of the majority moved for reconsideration, constitutes a deprivation of petitioner's rights to due process of law.

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PUBLIC SERVICE COORDINATED TRANSPORT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

To the Honorable the Chief Justice and the Associate Justices of the United States:

Your petitioner, Henrietta Kream, respectfully prays the issuance of a writ of certiorari to the Supreme Court of New Jersey, (a) to review the judgment and decision of that Court rendered on June 10, 1957, which judgment and decision affirmed the decision and judgment of the Superior Court of New Jersey, Appellate Division, of November 2, 1956. The judgment of the Appellate Division reversed the judgment of the Essex County Court, Law Division, which latter Court had affirmed the award of dependent's compensation made by the Workmen's Compensation Division of the New Jersey Department of Labor and Industry, to your petitioner, Henrietta Kream, the widow of the deceased workman, for the death of her husband from injuries to his heart as a result of an accident arising out of and in the course of his employment with the respondent.

In affirming the judgment of the Appellate Division, the Supreme Court of New Jersey unforseeably decided the case upon matters as to which there was no evidence before the court and contrary to the basis or theory of the case as accepted and tried and argued by both parties in all of the four tribunals of New Jersey, including the Supreme Court of New Jersey, which was the basis upon which the three tribunals below the Supreme Court of New Jersey grounded their respective decisions and judgments; furthermore, in affirming the judgment of the Appellate Division, the Supreme Court of New Jersey failed to apply or overrule the prior applicable decisions of courts, including its own, in that State; (b) also to review the order made by said Supreme Court of New Jersey on June 24, 1957, which denied the petition for a rehearing of the appeal of the petitioner, said petition for rehearing alleging that the judgment of the said Supreme Court deprived petitioner of property without due process of law and denied to the petitioner the equal protection of the laws, in contravention of Article 14, Section 1 of the Amendments to the Constitution of the United States.

Opinions Below.

The majority opinion in which four justices of the Supreme Court of New Jersey joined will be found on page 35 of the Appendix hereto and is reported in 24 New Jersey 432, 132 A. 2d 512 (1957), there being no dissenting opinion filed by any of the three justices who dissented.

The opinion of the Appellate Division will be found on page 1a of the Supplemental Appendix filed with the Peti-

tion for Certification in the Supreme Court of New Jersey and is reported in 42 N. J. Super. 307, 126 A. 2d 385 (1956).

The opinion of the Essex County Court, Law Division, will be found on pages 30a and 31a of the Appendix filed in the Appellate Division by the respondent and is not officially reported.

The opinion of the Workmen's Compensation Division of the New Jersey Department of Labor and Industry will be found on page 17a of the Appendix filed in the Appellate Division by the respondent and is not officially reported.

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked.

The petitioner contends that this court has jurisdiction to review the judgment in question upon writ of certiorari under the provisions of Title 28 United States Code, Section 1257 (3).

The judgment of the Supreme Court of New Jersey made and entered on June 10, 1957, in this action is repugnant to Article 14, Section 1 of the Amendments to the Constitution of the United States.

The order made and filed herein by the Supreme Court of New Jersey on June 24, 1957, denying the petition of the petitioner herein for a rehearing is likewise repugnant to said 14th Amendment.

The Federal questions sought to be reviewed were first raised in the Supreme Court of New Jersey, when that court, unforseeably decided the case upon matters not in the evidence and also failed to apply well-settled principles of law as to the facts in evidence, pursuant to the previous

decisions of all courts of New Jersey, including its own, without overruling such previous applicable decisions; the method of raising these Federal questions was by petition for rehearing in that court, which was timely, since it was done at the first opportunity; the way in which these Federal questions were acted upon by that court was by the entry of an order on June 24, 1957, pursuant to its Rule 1:9-4(c), that the petition for rehearing was denied because "no justice who voted with the majority having moved a reconsideration," which was not a denial on the merits and the Constitutional questions raised by petitioner were therefore never passed upon by that Court.

Questions Presented.

The questions presented by this petition are:

1. Did the Supreme Court of New Jersey transgress the 14th Amendment of the Constitution of the United States by deciding this case on new matters raised by it for the first time, in complete disregard of the evidence and of the theory on which both sides tried the case in the first instance and thereafter argued the three appeals in the Essex County Court, Law Division, in the Appellate Division, and in the Supreme Court itself, respectively, although such new matters had not been raised by either side in any of the four tribunals in New Jersey, without affording an opportunity to the petitioner to be heard on such new matters, particularly where the three lower tribunals, who heard the case, found as a fact, according to the evidence, that the driving of his bus by the petitioner's decedent, while in the commencement and throes of a heart attack,

aggravated the heart condition and caused his death, thereby denying to the petitioner "due process of law"?

2. Did the Supreme Court of New Jersey transgress the said 14th Amendment by failing to apply or overrule the well-settled principles of law as pronounced by all of the courts of New Jersey, including itself, that so long as the accident (in this case the driving of the bus after the start of and during the throes of the heart attack, aggravating, as it did, the heart condition and bringing about the death of petitioner's husband, is the accident), is one of the contributing causes of death, and it is not essential that the accident should be shown to be the sole contributing cause, compensation should be awarded, and thereby deny to the petitioner "the equal protection of the laws"?

3. Does the order made by the Supreme Court of New Jersey on June 24, 1957, denying a rehearing to the petitioner on the said constitutional questions and denying her an opportunity to be heard with regard to the new matters on which it based its decision and judgment on its asserted ground that rehearing was denied because no member of the majority moved for reconsideration, constitute a deprivation of petitioner's right to "due process of law"?

The Constitutional Provisions.

The applicable provisions of Amendment XIV, Section 1, of the Constitution of the United States, which govern the rights of the petitioner are:

> "* *; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 1 U. S. C. A. Const. Anno. 49.

Statement of the Case.

R denotes Appendix for Respondent-Appellant filed in Superior Court of New Jersey, Appellate Division. SA denotes Supplemental Appendix to Petition for Certification filed in Supreme Court of New Jersey.

Petitioner, is the widow of Harry Kream the decedent whom she married on April 2, 1949, and lived with him as husband and wife until he died on February 2, 1952.

Harry Kream, was born on August 10, 1900, and died on February 2, 1952. Antecedent to February 2, 1952, the petitioner's decedent was a man who enjoyed reasonably good health suffering from an occasional cold for which he would receive medical treatment when necessary.

For a period of approximately fifteen years antecedent to February 2, 1952, Harry Kream was employed as a bus driver by the Public Service Coordinated Transport, a New Jersey corporation, which is the respondent in this case.

He performed his work without complaint in a competent manner.

His employment was regular with very little lost time during that period on account of sickness.

On the last day that he lived, February 2, 1952, Harry Kream called up his immediate superior, Fred Ulbrich, who is the station master at the garage of the Public Service Terminal at 20th Street and 16th Avenue in Newark, New Jersey, some time between 11:00 and 11:30 a. m., and told Mr. Ulbrich that he was ill. The place from where Harry Kream called Mr. Ulbrich on the phone was Military Park, in the City of Newark, which was a terminus of this bus--

the downtown terminus of the bus, and he told him that he had been sweating and had the chills and wanted to be relieved. Mr. Ulbrich told the petitioner's decedent that he would send a relief bus driver to relieve him at 14th Avenue and 19th Street in Newark. The petitioner's decedent then drove this Public Service bus from Military Park through the city streets of Newark on this particular day, which was a Saturday, performing the functions of a bus driver, driving his bus and taking on and discharging whatever passengers there might have been from Military Park and the city streets of Newark and through the various streets that he would customarily traverse with his bus on the route, until he got to 14th Avenue and 19th Street, where he was relieved by a bus driver named Edward Wayda, who had been sent to relieve the decedent by Mr. Ulbrich; to whom Ulbrich stated that he was to relieve the decedent because the decedent was sick.

Mr. Wayda, the relief bus driver, testified that it was around 11:37 a. m. on February 2, 1952, when he was sent out by Mr. Ulbrich to relieve Harry Kream and that he was told by Ulbrich to proceed to 19th Street and 14th Avenue to take over the bus when Harry Kream arrived there. He testified that Kream walked out of the bus; that he, Wayda, stood at the step, that he noticed that Harry Kream was sweating; that the sweat was coming from his brow, but it was not ordinary sweat, as he stated, for someone in the month of February outdoors, as Kream was, when he saw him sweating. Kream was coming out of the bus, or had come out of the bus; that when he saw this, he felt that Kream should have someone drive him home and he told Kream to call up the company and have someone drive his car home. He also testified that from his obsrvations, in

addition to the fact that Harry Kream had this perspiration coming from his forehead, that he would not say that Kream was well, except for that perspiration; in other words, he stated Kream looked sick to him. He testified, that the reason that he told the decedent to call up the company and have someone drive his car home was because he knew that the decedent was ill and he had perspiration coming down from his forehead, but the decedent, according to this witness, stated he didn't want to be bothered; got into his car and drove off.

A short time thereafter, the petitioner's decedent, drove his car, followed by the driver of another automobile immediately in back of him, who observed the petitioner's decedent fall with his head or saw his head drop; the upper part of his body drop towards the wheel of the car; the car seemed to be out of control; the car careened across to the opposite side of the street; mounted a curb; cut across through a hedge and was stopped by the wall of a building "with an impact which was not a strong one;" that when this man who was riding in back of the decedent's car reached him, he found him on the floor of the front seat of the car, bleeding from his lips or mouth, which was cut, trying to say something. He couldn't seem to articulate and within a few minutes thereafter, the decedent stopped these motions of his lips.

An ambulance from the City Hospital of Newark came at about 12:40 p. m. and the ambulance surgeon pronounced the man dead and his body was removed to the County Morgue of Essex County, where a post mortem examination was made of the decedent, as disclosed by Exhibit P-2 in evidence, which is the autopsy protocol.

The autopsy report or protocol showed, among other things, "One area of complete occlusion in the upper left anterior descending branch" and "Another area of occlusion in the large branch of the circumflex near its origin," the same being so set forth under the caption "Coronary Arteries" in the autopsy report.

Dr. Saul Lieb, a heart specialist, testified for petitioner on R146a-11 to 17, that the driving of the bus, after the onset of his coronary insufficiency, at Military Park, just before the decedent telephoned for relief from his job, aggravated his heart condition and that such driving of the bus while being in the midst of his heart attack contributed to his death. In this opinion he was joined by Dr. Michael Ritota, a heart specialist, who also testified to that effect for petitioner (R112a-31 to 35 and R138a-8 to 13).

Respondent's doctors, Dr. Jerome Kaufman and Dr. Jack York, on the other hand testified that the death was due to natural causes although both of them conceded under cross examination that the decedent, with an attack of coronary insufficiency should have been put to bed immediately when he was at Military Park where he had telephoned for relief, and should not have driven his bus during such a heart attack of coronary insufficiency.

The two experts for petitioner, Drs. Lieb and Ritota, had also testified that with an attack of coronary insufficiency the decedent should have been put to bed at once.

Reasons for Granting the Writ.

The Writ of certiorari should be allowed in the present case, because,

1. The petitioner's award for the death of her husband has been taken away from her without due process of law and in respect thereto she has been denied the equal protection of the laws, both guaranteed to her by the first section of the 14th Amendment to the Constitution of the United States and this deprivation of her constitutional rights can only be remedied by the issuance of the writ of certiorari herein applied for.

2. The order made by the Supreme Court of New Jersey on June 24, 1957, denying a rehearing to the petitioner on the said constitutional questions, and denying her an opportunity to be heard with regard to the new matter on which it based its decision and judgment on its asserted ground that rehearing was denied because no member of the majority moved for reconsideration, constitutes a deprivation of petitioner's rights to due process of law.

ARGUMENT.

The following is our argument amplifying the aforesaid reasons for the allowance of the writ:

(A).

In her claim petition for dependent's compensation filed with the Workmen's Compensation Division of New Jersey, the petitioner set forth the claim for compensable accident, to her decedent, as follows (R2a-35 to 40):

"17. What the nature of the accident, and how did it happen? Decedent became ill on his tour of duty. He was required and directed to drive his bus in that condition until he could be relieved. The exertion of so driving his bus aggravated his illness and resulted in his death on February 2, 1952 from injury to his heart."

The respondent's answer denied the accident (R7a).

At the conclusion of the trial in the Workmen's Compensation Division, the Deputy Director rendered his opinion (R17a) and thereafter entered an Award and Rule for Judgment for dependent's compensation in favor of the petitioner, the widow (R24a), stating on R25a that, "The accident and injury occurred as follows: Decedent while driving his bus suffered injuries to his heart which brought about his death."

The respondent thereupon appealed from the award and judgment of the Workmen's Compensation Division to the Essex County Court, Law Division, which affirmed the said award, by a judgment made and entered in the Essex County Court on April 30, 1956 (R36a). The preliminary and final oral decisions of the Essex County Court are on R30a and R31a, respectively. In his preliminary oral decision Judge Speakman sitting in the Essex County Court stated on R30a:

> "The case narrows down to the question of whether or not the continuous driving of the bus after the onset of the attack under the circumstances here constitutes an unusual strain. There is sufficient evidence in the record to justify the conclusion that the subsequent driving of the bus was the precipitating factor and did aggravate the condition, and the medical testimony supports that conclusion, but whether or not that constitutes an unusual strain within the

purview of our definition of that term or those terms to me is the final problem.

"I am going to give it a little more consideration."

In his final oral decision, Judge Speakman stated, on R35a:

> "The exertion and emotional and nervous strain he experienced thereafter driving the bus through the city streets of Newark for a mile and a half under that unusual condition of having the commencement or beginning of a coronary attack seems to me to constitute the unusual event or strain to satisfy the requirements of our rule. There is ample evidence in the form of expert testimony in the record to sustain the hypothesis that but for his continued employment, that is, for his continued driving of the bus after advising his superior that he was ill and not being relieved, he wouldn't have died at the time he did. It is not necessary that it be found that he certainly would have lived. It is only necessary under our cases to find that it was a reasonable probability that he would not have died when he did but for the continued driving.
>
> "Where, as here, an employer through its proper superior officer has knowledge that an employee is ill and he does not then relieve the employee of his duties, even though he does not expressly direct him to continue with them, the fact that the employee in furtherance of his employer's business continues to perform these duties in that condition seems to me to constitute the unusual event or exertion."

From the Essex County Court judgment the respondent appealed to the Superior Court of New Jersey, Appellate Division, which reversed the Essex County Court, its opinion being on SA1a. It is apropos to set forth the medical

proofs as stated by the Appellate Division on SA3a-26 to 40 and SA4a-5 to 8, as follows:

> "There is unanimity of opinion that decedent before the events of the day in question had a general condition of arteriosclerosis and that when he telephoned for relief he was in the early throes of a cardiovascular collapse. One expert for petitioner, Dr. Ritota, testified that any effort, even walking, was 'an imposition' upon the decedent's heart in his then condition and driving the bus was a 'contributing factor' to the death. Dr. Lieb testified for petitioner that the driving of the bus 'aggravated the attack of coronary insufficiency which had already had its onset and contributed to and hastened the death that eventually happened.'
>
> "Dr. York and Dr. Kaufman testified on behalf of respondent to the effect that there was no causal relationship between the driving of the bus and the death, although both admitted that the driving of the bus would not be medically indicated for a person undergoing the commencement of an attack of coronary insufficiency."

The Appellate Division then stated on SA5a-12 to 16 as follows:

> "The record is clear that in driving the bus from Military Park to the relief point the decedent was doing his everyday job in his normal manner and that no unusual strain or exertion was involved insofar as concerns the nature of the work done."

Thereafter followed the statement by the Appellate Division as to the position of petitioner, on SA5a-37 to 40 and SA6a-5 to 8, as follows:

> "Indeed counsel for petitioner at the argument candidly disclaimed any assertion of an emotional or

nervous strain and placed his case, as in the brief, on the flat position that the effort of driving the bus, while ordinarily not an unusual strain, became such when undertaken by a person then in fact undergoing a coronary attack, whether or not he knew what kind of illness had seized him."

The Appellate Division reversed the lower tribunals on the ground that there was no unusual exertion in the bus driving under the circumstances, stating that "we have no choice but to follow" the unusual exertion rule "insofar as concerns the nature of the work done."

It is vitally important to note that the Supreme Court of New Jersey in its opinion in the instant case did not affirm the Appellate Division on said basis at all and did not agree with nor accept such basis.

During the trial of the case Dr. Saul Lieb testified on R146a-11 to 17, that "the driving of the bus, after the onset of such an attack from a medical standpoint was certainly inadvisable and, in my opinion aggravated the attack of coronary insufficiency which had already had its onset and contributed to and hastened the death that eventually happened," and Dr. Ritota testified in similar vein on R112a-31 to 35 inclusive and on R138a-8 to 13 inclusive, and respondent conceded in its Supreme Court brief that they so testified. The only contention of the respondent at the trial in the Workmen's Compensation Division through its medical witnesses, was that the death resulted from natural causes—none of the three lower tribunals had before it any other evidence (and that was the only thing considered below therefore), than the exertion of driving the bus while decedent was in the throes of his heart attack—the same

evidence and contentions were before the Supreme Court of New Jersey.

There was no medical proof offered by the respondent that any other activity of the decedent, referred to by the Supreme Court in its opinion, was in any way connected with his death—no evidence on this score was offered by the respondent and therefore was not in the case. The only activity of the decedent contributing to his death was his driving of the bus while in the midst of his heart attack and on this score, the respondent stated, in its brief in the Appellate Division, in its brief in opposition to the petition for certification in the Supreme Court, and in its main brief before the Supreme Court on the appeal, as shown by copies of the pages of each of its said briefs, which are a part of the Appendix hereto, as follows:

> "The only exertion in this case is the normal, routine exertion of driving a bus, which Kream had done for years."

The respondent was arguing this way because under the unusual exertion doctrine as espoused by the prior decisions of the Supreme Court, there could only be a recovery in a heart case injury or death if the work entailed unusual exertion. Even at the oral argument before the State Supreme Court, not a single statement was made by counsel for respondent that there was any other exertion, according to the evidence, than driving the bus. Furthermore, not a single member of the Supreme Court, by word, hint or question, directed to either counsel during the oral argument, indicated any thought with regard to considering any other activity of the decedent, other than driving the bus, as a cause of the death. If any such idea had been forth-

coming from the Court during oral argument, we would at least have been afforded an opportunity to answer any question or questions in this regard. This alone, as we pointed out to the Supreme Court in our petition for rehearing, entitled us to have the requested reargument granted, for the rationale of the Supreme Court's opinion seems to be found in the following language:

> "We cannot speculate as to whether any exertion created by getting out of the seat of the bus at the end of the line, or driving the bus or walking from the bus (across the street) to the parked car and then driving several miles before the fatal spasm in the attack could have been the inducing factor."

There was no need for speculation by the Supreme Court. There was the specific evidence that the driving of the bus in the midst of the heart attack aggravated the heart condition and brought about the death. There was no evidence offered by the respondent to show that any other activity, than bus driving, brought about the death, and the facet of reasoning on this score by the Supreme Court of New Jersey is without foundation, incongruous and unjustifiable.

It would appear that the Supreme Court was confronted with a dilemma requiring it to clarify its rule in heart cases to include unusual exertion by the worker as well as the unusual exertion in the employment. Faced with this problem, the Court in order to avoid any change in the rule introduced into the case that which had not been presented or argued in any of the three lower tribunals or in the Supreme Court. Having taken this course, the Supreme Court should have granted the requested rehearing in order to give the petitioner her opportunity to be heard and her day

in court on this foreign issue. By not granting the petition for rehearing, the Court arbitrarily denied petitioner due process of law, just as it had denied her both Constitutional rights under the 14th Amendment, Section 1, by its decision and judgment.

The facts legitimately found by a State Supreme Court may not ordinarily be subject to review by this court; but this does not mean that statements of fact erroneously made by it and having no foundation in the record, which is before this court, would be accepted by your Honors as concluding petitioner's constitutional right to due process of law—to an opportunity to be heard.

This Court, said, in the case of *Interstate Amusement Co.* v. *Olbert*, 239 U. S. 567:

> "It is settled that such findings of fact, in ordinary cases, other than those arising under the 'contract clause' of the Constitution, are binding upon this court. Waters-Pierce Oil Co. *v.* Texas, 212 U. S. 86, 97; Rankin *v.* Emigh, 218 U. S., 27, 32; Miedreich *v.* Lowenstein, 232 U. S., 236. But the rule has its exceptions, as, for instance, where there is ground for the insistence that a Federal right has been denied as the result of the finding that is without support in the evidence. Southern Pacific Co. *v.* Schuyler, 226 U. S., 601, 611; N. C. R. R. *v.* Zachary, 232 U. S., 248, 259; Carlson *v.* Washington, 234 U. S., 103, 106."

In the case of *Carlson* v. *Curtiss*, 234 U. S. 106, the Court said:

> "Among the assignment of errors is one contested on the refusal of the Supreme Court to find, as a fact, that the acts, for the performance of which plaintiff in error was held guilty of contempt were

done under the direction and authorization of officials of the War Department of the United States, acting in pursuance of and in accordance with the acts of Congress. While in ordinary cases, we are bound by the findings of the state court of last resort respecting matters of fact, *it is hardly necessary to say that that court cannot, by omitting to pass upon the basic questions of fact, deprive the litigant of the benefit of a Federal right any more than it could do so by making findings that were wholly without support in evidence.* Just as this court, where its appellate jurisdiction is properly invoked and all evidence is brought before it, will, if necessary for a decision of the Federal question, examine the entire record, in order to determine whether there is evidence to support the findings of the state court, so it is our duty, in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom, and which would furnish a basis for the asserted Federal right. Southern Pacific R. R. *v.* Schuyler, 227 U. S., 601, and cases cited." (Emphasis ours.)

In the case of *N. C. R. R.* v. *Zachary*, 232 U. S., 258, 259, the Court said:

"It was, however, further held by the Supreme Court of North Carolina that deceased, at the time he was killed was not in fact employed by the Southern Railway, the lessee in the interstate commerce. There are several grounds upon which this decision was based, or upon which it is said to be supportable, and these will be separately noticed. Of course if upon the findings, any essential matter of fact was in doubt, it should have been submitted to the jury under proper instructions. The rulings of the trial court deprived plaintiff in error of the opportunity to go to the jury upon the question. But it is now

insisted that there was no evidence to show that the deceased was engaged in interstate commerce. This renders it incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. Southern Pacific R. R. *v.* Schuyler, 227 U. S. 601," (and cases cited).

In the case of *Southern Pacific R. R.* v. *Schuyler,* 227 U. S. 601, 611, the Court said:

"It is insisted (a) that there is no presumption that the Railroad Company violated the prohibition of the Hepburn Act by granting to Schuyler a free interstate ride, and that there is no evidence in the record to support such conclusion; and while it is conceded that ordinarily, upon writ of error to a state court this court does not revise the findings of fact, yet *it is insisted in this case that a Federal right has been denied as a result of a finding of fact, which is without support in the evidence;* that the evidence is before us in the record by which that insistence may be tested, and that the status of Schuyler as an interstate passenger is a mixed question of law and fact, and that *it is incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. The insistence as to the power and duty of this court in such a case is well founded.* Kansas City S. Ry. Co. *v.* Albers Com. Co., 223 U. S., 573, 591; Cedar Rapids Gas Co. *v.* Cedar Rapids, 223 U. S., 665, 668; Creswill *v.* Knights of Pythias, 225 U. S., 246, 261." (Emphasis is ours.)

In the case of *Creswill* v. *Knights of Pythias,* 225 U. S. 246, 261, the Court said:

"• • • While it is true that upon a writ of error to a state court we do not review findings of fact

nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as a result of a finding of fact, which it is contended there was no evidence whatever to support, and the evidence is in the record, the resulting question of law is open for decision; (b) that where a conclusion of law as to Federal right and finding of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question to analyze and dissect the facts, to the extent necessary to do so, *the power exists as a necessary incident to a decision upon the claim of denial of a Federal right.*" (Emphasis ours.)

That the judgment of the Supreme Court of New Jersey rendered without a trial or argument upon the new matters raised by it, would deprive Petitioner of her property, without due process of law, appears to be a proposition so plain, as to demonstrate itself—a mere statement thereof being sufficient. It is not probable that the term "due process of law" will ever be completely defined; the gradual process of definition by judicial exclusion and inclusion may go on indefinitely; but the definition had progressed far enough for all the purposes of the question herein raised by petitioner, very early in our jurisprudence—in fact, Mr. Webster's definition in the *Dartmouth College* case is sufficient.

Definition given in the text of Cyc., Vol. 81, p. 1080:

> "'Due process of law' in each particular case means such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for

the class of cases to which the one in question belongs. It has also been defined as: A law which hears before it condemns; which considers upon inquiry, and renders judgment only after trial. Law in its regular course of administration through courts of justice. A prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property. An orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to define, enforce and protect his rights. * * *"

This Court said in the case of *Craig* v. *Harney*, 331 U. S. 367, 373, 374 (1947):

> "In a case where it is asserted that a person has been deprived by a state court of a fundamental right secured by the Constitution, *an independent examination of the facts by this Court is often required to be made.* See Norris *v.* Alabama, 294 U. S. 587, 590, 55 S. Ct. 579, 580, 79 L. Ed. 1074; Pierre *v.* Louisiana, 306 U. S. 354, 358, 59 S. Ct. 536, 538, 539, 83 L. Ed. 757; Chambers *v.* Florida, 309 U. S. 227, 228, 229, 60 S. Ct. 472, 473, 474, 84 L. Ed. 716; Lisenba *v.* California, 314 U. S. 219, 237, 238, 62 S. Ct. 280, 290, 291, 86 L. Ed. 166; Ashcraft *v.* Tennessee, 322 U. S. 143, 147, 148, 64 S. Ct. 921, 923, 88 L. Ed. 1192. This is such a case." (Emphasis ours.)

To the same effect is the case of *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 121 (1954), wherein this Court held that the long course of judicial construction establishes as a principle "that *the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest*" (emphasis ours), citing numer-

ous decisions by this Court under footnote 11 on page 121 of 347 U. S.—in other words that a State Supreme Court does not speak with final authority in a case where a Federal Constitutional right is involved and in the instant case the State Supreme Court would not even consider or pass upon the merits of the Constitutional question.

In the leading case of *Saunders* v. *Shaw,* 244 U. S. 317 (1917), in a suit to enjoin the collection of drainage tax, evidence offered by the plaintiff to prove that his land could not be benefited by the drainage improvement was ruled to be inadmissible upon defendant's objection, but was spread upon the record as carried to the state Supreme Court upon appeal from the judgment in defendant's favor. The latter court, after affirming the judgment reversed it on rehearing and granted a permanent injunction against the tax upon finding from the answer and testimony before it that the land had not been and could not be benefited, and declined to consider defendant's application for further rehearing. *Held, that in thus rendering judgment against the defendant without affording him an opportunity to introduce evidence upon the question of benefit, there was a violation of due process of law, contrary to the Fourteenth Amendment.*

In the case of *Georgia Ry. & Elec. Co.* v. *Decatur,* 295 U. S. 165, 170, 171 (1935), this court held that where by state statute the basis for assessing a street railway company for the cost of paving a street between and along its tracks is benefits resulting to the railway, but the benefits are presumed from the assessment and the company attacking it must prove an arbitrary abuse of legislative authority in that no benefit accrued to the railway, a refusal of a

state court to "receive or consider any proof whatever," in defense of a suit to collect the tax, tending to prove that no benefit resulted, on the ground that such evidence is immaterial, "amounts to a denial of a hearing on that issue in contravention of the due process of law clause of the Constitution."

In the case of *Brinkerhoff-Faris Trust & Savings Company* v. *Hill, Treasurer and Ex-Officio Collector of Henry County, Missouri*, 281 U. S. 673, 681, 682 (1930), this Court said:

> "Our present concern, is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission; and to reexamine and overrule the Laclede case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Compare Postal Telegraph Cable Co. *v.* Newport, 247 U. S. 464, 475-6."

(B).

As we have pointed out the driving of the bus by petitioner's decedent, while he was in the midst of a heart attack, aggravated his heart condition and brought about his

death. This hypothesis was proven and under the law in New Jersey reasonable probability is the touchstone and gauge of proof in a Workmen's Compensation case. The Supreme Court of New Jersey in the instant case re-stated the same to be the law in the following language,

> "In testing whether the petitioner has maintained the burden of proof we have held that the standard as to the quality of the evidence is probability rather than certainty, and if under the evidence the tendered hypotheses become a rational inference based upon the preponderance of probabilities the burden of proof is sustained. Gilbert *v.* Gilbert Machine Works, Inc., 122 N. J. L. 533 (Sup. Ct. 1939); Green *v.* Simpson & Brown Construction Co., 14 N. J. 66, 69 (1953); Mergel *v.* New Jersey Conveyors Corp., supra (14 N. J. 609, 613-1954)."

In the case of *Mergel* v. *New Jersey Conveyors Corp.*, cited in its said opinion in the instant case, the Supreme Court stated that,

> "Conclusive proof can seldom be offered and is not requisite. The standard is probability rather than certainty and if under the evidence the tendered hypothesis becomes a rational inference based upon a preponderance of probabilities, the burden of proof is sustained, Gilbert *v.* Gilbert Machine Works, Inc., 122 N. J. L. 533 (Sup. Ct. 1939); Green *v.* Simpson & Brown Construction Co., 13 N. J. 292 (1953)."

However, the Supreme Court of New Jersey failed to apply these principles to the instant case although it did not overrule same. Further, in the *Mergel* case, *supra*, the Supreme Court awarded compensation to the widow of Mergel in a situation where the decedent became ill on his job and as the Supreme Court stated,

> "He (Mergel) left the plant at 11:30 A. M. and about 1:50 P. M. he was found dead on the Exchange Place platform of the Hudson and Manhattan Tubes, a three minute walk from the plant,"

nevertheless the Supreme Court under such circumstances did not say "We are left to speculate," in the *Mergel* case, as to whether the walk to the tube station on a hot day, July 30, 1951, brought about the death nor did it say, "We are left to speculate" on what else he might have done in the 2½ hours which elapsed between the time Mergel left his job and the time he was found dead, but it unequivocally allowed compensation to Mergel's widow even though "the medical testimony was in dispute", as it frankly stated.

The Supreme Court of New Jersey further failed to apply and did not overrule the well-established rule of law in a Workmen's Compensation case in New Jersey that so long as the accident was one of the contributing causes, and it need not be the sole cause, of the injury or death, a compensable case is made out.

This rule was succinctly stated by the Court in *Cavanaugh* v *Murphy Varnish Co.*, 130 N. J. L. 107 (Sup. Ct. 1943), affirmed by the Court of Errors & Appeals, on the Supreme Court opinion, in 131 N. J. L. 163 (1944). Our former Supreme Court in the *Cavanaguh* case, *supra*, stated as follows, on page 111 of 130 N. J. L.:

> "As was said in Ciocca *v.* National Sugar Refining Co., supra: 'A compensable accident arises out of the employment when the proofs show that (1) the employment was one of the contributing causes without which the accident would not have happened,

> and (2) that the accident was one of the contributing causes without which the injury or death would not have resulted. Furferi *v.* Pennsylvania Railroad Co., 117 N. J. L. 508, 515, 189 Atl. Rep. 126. A compensable accident arises out of the employment when the proofs show a causal connection between the employment and the injury or death.'"

The Court in the quotation from the *Cavanaugh* case was referring to the opinion of the Court of Errors and Appeals in the case of *Cincca* v. *National Sugar Refining Co.*, 124 N. J. L. 329, 334 (1939).

This rule was reiterated and reaffirmed in the case of *Mixon* v. *Kalman*, 133 N. J. L. 113, 116 (E. & A. 1945), wherein Mr. Justice Heher stated in the opinion as follows:

> "If the employment was one of the contributing causes without which the accident would not have happened, the statutory language is satisfied. *These are settled principles of exposition in this state.* Geltman *v.* Reliable Linen and Supply Co., 128 N. J. L. 443." (Emphasis ours.)

In *Geltman* v. *Reliable Linen and Supply Co.*, 128 N. J. L. 443, 448 (E. & A. 1942), cited in the *Mixon* opinion, *supra*, Mr. Justice Heher stated:

> "It is the settled rule that if the employment 'is one of the contributing causes without which the accident which actually happened would not have happened', the statutory requirement in this behalf is met. Newcomb *v.* Albertson, 85 N. J. L. 435; Terlecki *v.* Strauss, 85 Id. 454; affirmed 86 Id. 708; Furferi *v.* Pennsylvania Railroad Co., 117 Id. 508."

Another leading case in New Jersey which followed this well established rule is *Schust* v. *Wright Aeronautical Cor-*

poration, 7 N. J. Super. 54, 58 (App. Div. 1950) which was a multiple sclerosis case; certification denied by Supreme Court in 5 N. J. 177 (June 26, 1950), wherein the Appellate Division stated as follows, on page 58 of 7 N. J. Super.:

> "The case of Marshall *v.* C. F. Mueller Co., 135 N. J. L. 75 (Sup. Ct. 1946), is also in point, stating: '* * * and it is not necessary that the accident should be shown to be the sole contributing cause of the injured condition of the employee. Furferi *v.* Pennsylvania Railroad Co., 117 N. J. L. 508; Davis v. Lotz, 126 Id. 615; Cavanaugh *v.* Murphy Varnish Co., 130 Id. 107; affirmed, 131 Id. 163.'"

This settled principle of law has been followed right down to the present time by all of our lower courts and by the Supreme Court of New Jersey. See the case of *Cierpial* v. *Ford Motor Co.*, 16 N. J. 561, 566 (1954), wherein it was stated, as follows:

> "However, where the employment is a contributing cause to the accident, the statutory requirement is met. The employment need not be the sole or proximate cause of the injury. It is sufficient if it is a necessary factor leading to the accident."

In the opinion of the Supreme Court in the instant case, it was stated, as follows:

> "They (the medical experts) were in agreement that the decedent had such an acute attack and that he had a general condition of arteriosclerosis so that, if he were *in the throes of a cardiac vascular attack, the driving of the bus* or in fact any exertion or activity *would have contributed to the final end result which was his death.*" (Emphasis ours.)

This being so, the driving of the bus was a contributing factor in Kream's death, driving the bus as he was, in the throes of a heart attack—the driving of the bus did not have to be the sole contributing factor in his death and under the rule stated above, the widow petitioner was entitled to recover compensation as a dependent of Kream. There was a finding by each of the three tribunals below the Supreme Court that the bus driving by Kream caused his death, but the Appellate Division had reversed the County Court on the ground that bus driving was Kream's daily job and therefore did not constitute unusual exertion "insofar as concerns the nature of the work done."

In disregarding and not applying the foregoing rules of law, the Supreme Court deprived petitioner of the "equal protection of the laws", in violation of the Fourteenth Amendment, Section 1, of the Constitution of the United States.

(C).

The petition for rehearing was filed under Rule 1:9-4(a) of the Supreme Court of New Jersey Rules within 10 days after judgment was entered. The Federal questions under the 14th Amendment, Section 1, of the Constitution of the United States were timely raised by said petition, because the rights of petitioner under the 14th Amendment had been violated for the first time, by the decision and judgment of the Supreme Court made and entered on June 10, 1957—*Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673 (1930); *State of Missouri* v. *Gehner*, 281 U. S. 313 (1930)—it could obviously not have been done earlier by the petitioner.

The respondent filed its answer to the petition for rehearing, in which it presented no real argument in opposition to the petition on the Constitutional questions, making the bare statement that "it is difficult to see in what manner the due-process clause, on a federal basis, has any application."

The Petition for Rehearing and the Answer in Opposition are both submitted herewith as part of the record below.

The Supreme Court by order dated and filed on June 24, 1957, denied the petition on the ground, as stated in the order, that "no justice who voted with the majority having moved a reconsideration, it is Ordered that the petition for rehearing is denied."

Not only was the door shut in petitioner's face by the denial of a rehearing but it was actually doubly shut in petitioner's face by the Court's rule that the door could only be reopened by the beckoning voice of one of its members who had first shut the door—he having decided adversely to the petitioner, first upon a foreign issue. This rule of the Supreme Court of New Jersey is Rule 1:9-4(c) which provide as follows:

> "A petition for rehearing is not subject to oral argument, and the petition will not be granted, unless a justice who concurred in the judgment or decision moves it and a majority of the court so determines."

This rule was originally Rule 1:4-8, effective September 15, 1948, under the new Court system of New Jersey but subparagraph (c), *supra*, was for the first time made a part

of the rule by amendment on December 7, 1950, when it was added thereto.

Where, as here, the application for a rehearing is predicated upon the decision of the court, based upon matters which were not argued either before the court or before either of the lower tribunals and specifically the point is made that the decision of the court is a denial of due process of law and of the equal protection of the laws, because of the lack of an opportunity to argue this new matter interjected into the case, the court in passing upon the application for a rehearing should do so on the merits and should not invoke or apply its ordinary rule which requires that upon an application for a rehearing, the motion to reconsider must be made by one of the justices who joined in the majority opinion. This rule in the ordinary situation may be salutary but where as here the Federal question is raised on the petition for rehearing, which could not have been raised in advance of the decision of the court, this rule should not be applied and it should be relaxed and the motion for rehearing should have been considered upon the merits of the application.

The reason for the rule is that in the ordinary case the applicant for a rehearing desires to reargue the points that have already been argued and in that situation the rule has a valid purpose but it should have no application where a petition for a rehearing is predicated upon the denial of the Federal Constitutional requirements, of due process and equal protection, arising from the decision of the State Supreme Court.

What petitioner was seeking on her rehearing petition was only a request to be heard. The Constitutional ques-

tions raised by petitioner were not passed upon nor determined to be with or without merit by the Supreme Court and petitioner now has exhausted her remedies under New Jersey procedure and her Constitutional rights are taken away as of this moment except for this Court's intervention.

It might be argued by the respondent that we have here, in this case, merely private litigation and that this court should probably not grant certiorari. Such an argument was answered by this court in the case of *Craig* v. *Harney*, 331 U. S. 367, 378 (1947), wherein this Court stated:

> "There is a suggestion that the case is different from Bridges *v.* California, supra, in that we have here only private litigation, while in the Bridges case labor controversies were involved, some of them being criminal cases. The thought apparently is that the range of permissible comment is greater where the pending case generates a public concern. The nature of the case may, of course, be relevant in determining whether the 'clear and present danger' rule is satisfied. But, the rule of the Bridges and Pennekamp cases is fashioned to serve the needs of all litigation, not merely select types of pending cases."

Actually, however, the constitutional right involved in the instant case is a matter of public concern, involving as it does, a Workmen's Compensation case and the beneficial and salutary provisions of Workmen's Compensation Laws in New Jersey and the other States of our country should be fostered and given full effect for the protection of industrial workers and their dependents and not curtailed by arbitrary rulings not based on the facts in evidence.

Where a constitutional right is involved, which a petitioner insists he or she was deprived of by the action of a state court, it matters not that such a petitioner is a convicted felon, a member of a group charged with disloyalty to and the advocating of the overthrow of our Government, or a plain everyday citizen of our country, such as the widow, petitioner in this case, and this court has repeatedly intervened to protect the constitutional rights of such person where the state process has been exhausted with such constitutional rights disregarded by and ignored by the State Court. It is well to quote the language of this court in the case of *Chessman* v. *Teets*, 354 U. S. 156, S. Ct. ,1 L. Ed. 2d 1253, 1260, 25 U. S. L. W. 4420, 4422 (June 10, 1957), that

> "Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. * * * The proponent before the Court is not the petitioner but the Constitution of the United States."

Judicial fiat, just as legislative fiat, may not take the place of fact in the determination of issues involving life, liberty or property and if it does, a deprivation of due process of law results.

May we be permitted to be humane and say, with all sincerity, as men of flesh and blood and heart, that this bereaved widow, having been given an award which compensates her from a monetary standpoint, and so far as money can compensate, for the loss of her husband, should not be deprived of it by an arbitrary ruling without her day in court in violation of her Constitutional rights, as we sub-

mit, she was deprived by the State Supreme Court and she comes to this Court prayerfully asking for redress to the end that she be secured in her constitutional rights and thus realize the fulfilment of the hopes expressed in the words of this Court's opinion in the case of *Griffin* v. *People of the State of Illinois*, 351 U. S. 12, 16, 17, wherein Mr. Justice Black, as the voice of this court, wrote:

> "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Charta: 'To no one will we sell, to no one will we refuse, or delay, right or justice. * * * No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land.'"

And thus may it be said that this helpless widow has not knocked upon the portals of this court in vain.

Conclusion.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

AARON GORDON,
Attorney for and of counsel
with petitioner.

JOHN A. HARTPENCE,
JOHN W. OCKFORD,
Of counsel with petitioner.

APPENDIX.

Opinion of Supreme Court of New Jersey.

***Kream* v. *Public Service Coordinated Transport*; reported in 24 N. J. 432 (1957).**

Argued May 6, 1957; decided June 10, 1957.

On appeal from the Superior Court, Appellate Division.

Mr. Aaron Gordon argued the cause for the appellant; Mr. Milton Albert, attorney.

Mr. Henry J. Sorenson argued the cause for the respondent; Mr. David M. Sellick, attorney.

The opinion of the Court by delivered by Oliphant, *J.*

This is an appeal from a judgment of the Superior Court, Appellate Division, which reversed a judgment of the County Court that affirmed an award of compensation to the petitioner-appellant for the death of her decedent husband.

Decedent, aged 50, was a bus driver of the respondent and had been in its employ for several years. There is no proof in this case of a prior coronary involvement. On February 2, 1952, he apparently left his home in good health around 9:00 o'clock and reported for work at the garage of the respondent at 20th Street and 16th Avenue, Newark, N.J.; took out his bus and went on his regular run at 9:58 A. M. Later, at 11:35 A. M., he called the dispatcher, Ulbrich, at the garage stating he was at the end of the run at Military Park and requested that he be relieved of duty because "he had been sweating and he had chills". The decedent did not ask for medical attention and volunteered no information beyond saying he was having chills and fever and wanted to be relieved at the end of the particular

run he was then starting. He specifically asked to be relieved at 14th Avenue and 19th Street which is the regular relief point. When he had driven to work that morning before reporting to the garage he had parked his own automobile between 19th and 20th Street on 14th Avenue.

The dispatcher, at about 11:37 A. M., told the relief driver Wayda, to relieve the decedent as requested. Wayda got his things together and then proceeded to the relief point, a distance of some three blocks, and waited there for the arrival of the bus. He stated he got there about 11:50 and waited about five minutes for the bus which finally came along and that he noticed the decedent, Kream, was sweating which was unusual for that time of year, which was February. He testified "I told Harry Kream to call up the company and have someone drive his car home", and that Kream answered "He did not want to be bothered * * * that he would go home himself." He left the bus and walked across the street to where his car was parked.

The decedent started to drive home in his own car and had gone several miles when he apparently lost consciousness and his car veered across the street out of control, ran into a hedge and came to a stop against a retaining wall. A direct eye witness, one Bloom, who was experienced in first aid, crawled into the car to give aid and noticed that Kream was bleeding from the mouth and stayed with him until he died, which was about five minutes later and before the police arrived. He fixes the time very definitely as shortly after noon time because a minute or two before the accident, he was quite startled when the air raid siren went off just as he was passing the siren. A careful evaluation of the testimony supports the conclusions below that little weight should be given to testimony of a witness for the respondent that the decedent had gone back to the garage and visited for a while before starting for home.

An autopsy was performed on the body about two hours after death. The certification by the medical examiner indicates that the autopsy showed, among other things, "occlusive coronary arteriosclerosis". The "autopsy protocol" states, under item "15. Coronary Arteries"; "* * * one area of complete occlusion in upper anterior descending branch. Another area of occlusion in a large branch of the circumflex near its origin. No thrombi". The "primary cause of death" is given as "coronary arteriosclerosis, severe, occlusive". There was no involvement of the heart muscle.

The appellant did not press her compensation claim in the original instance, but instituted a common law action on the theory of *Szabo* v. *P. R. R. Co.*, 132 N. J. L. 331 (E. & A. 1945), alleging that the respondent was negligent in failing to provide medical treatment for its employee in an emergency and should have put in the reach of such stricken employee medical care which could have saved his life or possibly avoided further bodily harm. The trial court directed a verdict in favor of the respondent in that action. The same proofs put in that case are part of the record in the compensation hearing below and here.

It is perfectly clear from the record that it was never brought to the attention of the dispatcher that the decedent was seriously ill. All that the dispatcher knew was that he was sweating and having chills; neither was he aware that the decedent was undergoing a coronary attack of a severe nature as was later indicated by the autopsy, nor was there any prior history known to either the dispatcher or the decedent of a similar attack.

The medical experts disagreed as to whether the employment was a competent producing cause in aggravating the attack of acute coronary insufficiency. They were in agreement that the decedent had such an acute attack and

that he had a general condition of arteriosclerosis so that, if he were in the throes of a cardiac vascular attack, the driving of the bus or in fact any exertion or activity would have contributed to the final end result which was his death. In the type of attack he suffered, complete rest was the only thing that could have helped.

The Appellate Division found the record was clear that in driving the bus from Military Park to the relief point the decedent was doing his every day job in the normal manner, hence, there was no unusual strain or exertion with respect to the work done. It also found there was nothing in the proof to show that the decedent realized the serious nature of his illness or any indication he was suffering from emotional or nervous strain. They point out the fact he drove the bus to the relief point on his own suggestion and there rejected advice that he allow himself to be driven home by someone else was indicative to the contrary. As to the appellant's contention that the effort of driving the bus, while ordinarily not an unusual strain, became such when undertaken by a person then in fact undergoing a coronary attack whether or not he knew what kind of illness had seized him, they held this did not meet the intent of the line of decisions headed by *Lohndorf* v. *Peper Bros. Paint Co.*, 134 N. J. L. 156 (Sup. Ct. 1946), aff'd 135 N. J. L. 352 (E. & A. 1947).

Appellant argues as he did below that the inquiry here is: Shall compensation be denied to one who drives a bus in the midst of and during a heart attack and who meets with injury or death as a result of such work even though driving a bus was his regular employment? Of course, this statement of the proposition assumes that certain facts have been established.

In the ordinary course of events death normally ensues or results from natural causes. In many actions, both civil

and criminal, where the question arises whether the death resulted from other than natural causes, the one who asserts such a proposition has the burden of proving it. Thus we have held in compensation cases that there is a presumption that death from heart disease results from natural causes and the petitioner has the burden of proving that the death resulted from an accident arising out of and in the course of the employment. In order for the death to be compensable the evidence must preponderate in favor of such tendered hypotheses. *Mergel* v. *N. J. Conveyors Corp.*, 14 N. J. 609, 613 (1954).

In testing whether the petitioner has maintained the burden of proof we have held that the standard as to the quality of the evidence is probability rather than certainty and if under the evidence the tendered hypotheses become a rational inference based upon the preponderance of probabilities the burden of proof is sustained. *Gilbert* v. *Gilbert Machine Works, Inc.*, 122 N. J. L. 533 (Sup. Ct. 1939); *Green* v. *Simpson & Brown Construction Co.*, 14 N. J. 66, 69 (1953); *Mergel* v. *N. J. Conveyors Corp. supra.*

On the proofs before this court any inference that may be drawn would have to be based upon one of several possibilities. We are left to speculate as to what caused and when the onset of the original attack came. No rational inference based upon preponderance of probabilities can be drawn from the medical testimony as to what particular act of the decedent after the onset of the attack could have been a causative factor, if any, in the aggravation thereof. The only probable inference that can be drawn from the medical testimony is that any bit of exertion, either connected with or not connected with the employment, could have been an inducing factor in the fatal result here.

We cannot speculate as to whether any exertion created by getting out of the seat of the bus at the end of the line,

or driving the bus or walking from the bus to the parked car and then driving several miles before the fatal spasm in the attack could have been the inducing factor. There is absolutely no proof in this case that any act related to the employment induced the onset of the original attack of which the original chills and perspiration are but probable symptoms.

We realize the difficulty of obtaining proofs in a situation such as this, but the Legislature has not decreed that every death occuring or injury sustained in employment must be compensated by the employer and until such time, the burden of proof established by the cases must be sustained by the petitioner. In this case it was not.

The judgment is affirmed.

Mandate on Affirmance of Supreme Court of New Jersey.

Appeal Docket No. 2199.

HENRIETTA KREAM, Petitioner-Appellant, *vs.* PUBLIC SERVICE COORDINATED TRANSPORT, Respondent-Respondent.	Civil Action. On Appeal. Mandate on Affirmance.

This cause having been duly argued before this Court by Mr. Aaron Gordon, counsel for the appellant and Mr. Henry J. Sorenson, Counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Appellate Division is affirmed without costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Appellate Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 10th day of June, 1957.

JOHN H. GILDEA,
Clerk of the Supreme Court.

FILED
June 10, 1957
JOHN H. GILDEA,
Clerk.

Order Denying Petition for Rehearing.

SUPREME COURT OF NEW JERSEY.

HENRIETTA KREAM,
Petitioner-Appellant,
vs.
PUBLIC SERVICE COORDINATED TRANSPORT,
Respondent-Respondent.

Docket No. 2199.
On Petition for Rehearing.

This matter having been duly presented to the Court, and no justice who voted with the majority having moved a reconsideration, it is Ordered that the petition for rehearing is denied.

Witness, the Honorable Harry Heher, Presiding Justice, at Trenton, this twenty-fourth day of June 1957.

JOHN H. GILDEA,
Clerk.

FILED
June 24, 1957

JOHN H. GILDEA,
Clerk.

Copy of page 19 of brief of respondent-appellant, Public Service Coordinated Transport, filed in Superior Court of New Jersey, Appellate Division, and thereafter also filed in the Supreme Court of New Jersey (emphasis petitioner's):

Wayda who saw decedent at that point testified that Kream, who was sweating on the brow, performed the normal routine action of marking and finishing off his day card before turning the bus over to Wayda, after which Kream got up, stepped and walked out of the bus; his walk was the ordinary one, just the same as the witness and counsel would walk (R261a-25). Wayda gave no testimony regarding chills (R271a-35) and there was no testimony that Kream staggered or struggled out of the bus (R270a-27). Kream walked across the street to get into his parked car (R283a-35). The County Court further states (R34a-34):

> "* * * that when the decedent got out of his bus at the Military Park terminus and telephoned his superior he was at that time experiencing coronary insufficiency. * * *"

Kream did not state that he was experiencing coronary insufficiency or heart trouble of any kind; and a telephone call in the winter month of February to Ulbrich, a layman, meant a cold or attack of grippe; it is a matter of common knowledge that many persons work with these conditions and it is most unusual if they develop fatally. We contend that a physician with no prior information regarding Kream's arteriosclerotic and coronary condition would not have made a diagnosis of coronary insufficiency as a result of the information received in the February telephone call. The County Court further states (R35a-5):

> "* * * The exertion and emotional and nervous strain he experienced thereafter driving the bus

Copy of page 19 of brief of respondent-appellant, Public Service Coordinated Transport, filed in Superior Court of New Jersey, Appellate Division, and thereafter also filed in the Supreme Court of New Jersey
(continued from page 43).

through the city streets of Newark for a mile and a half under that unusual condition of having the commencement or beginning of a coronary attack seems to me to constitute the unusual event or strain to satisfy the requirements of our rule. * * *"

The only exertion in this case is the normal, routine exertion of driving a bus, which Kream had done for years. We contend the case contains no evidence of emotional and

Copy of page 9 of brief of respondent-respondent, Public Service Coordinated Transport, opposing certification, filed in Supreme Court of New Jersey (emphasis petitioner's):

ARGUMENT.

POINT I.

The Appellate Division did not commit legal error when, in deciding a Workmen's Compensation case, it used the well-established law in New Jersey which had been repeated time and time again by the Supreme Court.

The evidence discloses five episodes of motor vehicle driving by Kream: (1) The everyday driving of the bus and his private auto before February 2, 1952, (2) the driving of his own auto to the place he started work, (3) the usual and normal driving of the bus prior to the telephone call (R31a-23), (4) the usual and normal bus driving after the telephone call, and (5) the driving of his private auto about two miles across town to Hawthorne Avenue in the City of Newark before colliding with a wall. Episode No. 4 was selected by petitioner as being a compensable accident. The Appellate Division pointed out that the Deputy Director, in making an award, did not consider at all the question as to whether there was shown an unusual strain or exertion. The Appellate Division also pointed out that the "exertion and emotional and nervous strain" theory used as a basis to affirm the award in the County Court was entirely unfounded in the record (P5a-28). Counsel for petitioner on page 17 of the Petition states it was undoubtedly counsel's reasoning which led Judge Speakman in the County Court to rationalize the premise used for an award. Rationalization minus any factual support cannot serve as a basis for recovery. *The only exertion in this case is the*

Copy of page 9 of brief of respondent-respondent, Public Service Coordinated Transport, opposing certification, filed in the Supreme Court of New Jersey

(continued from page 15)

normal, routine exertion of driving a bus, which Kream had done for years. The case contains no evidence of emotional and nervous strain during the bus driving. You will not find it in the duties of the employment, which were the same before the telephone call as they were after. You

Copy of page 11 of brief of respondent-respondent, Public Service Coordinated Transport, filed in Supreme Court of New Jersey. (emphasis Petitioner's):

ARGUMENT.

POINT I.

The Appellate Division did not commit legal error when, in deciding a Workmen's Compensation case, it used the well-established law in New Jersey which had been repeated time and time again by the Supreme Court.

The evidence discloses five episodes of motor vehicle driving by Kream: (1) The everyday driving of the bus and his private auto before February 2, 1952, (2) the driving of his own auto to the place he started work, (3) the usual and normal driving of the bus prior to the telephone call (R31a-23), (4) the usual and normal bus driving after the telephone call, and (5) the driving of his private auto about two miles across town to Hawthorne Avenue in the City of Newark before colliding with a wall. Episode No. 4 was selected by petitioner as being a compensable accident. The Appellate Division pointed out that the Deputy Director, in making an award, did not consider at all the question as to whether there was shown an unusual strain or exertion. The Appellate Division also pointed out that the "exertion and emotional and nervous strain" theory used in the County Court was entirely unfounded in the record (P5a-28). Counsel for petitioner on page 24 of her brief states it was undoubtedly counsel's reasoning which led Judge Speakman in the County Court to rationalize the premise used for an award. The answer to this is—rationalization minus factual support cannot serve as a basis for recovery. *The only exertion in this case is the normal, routine exertion of driving a bus*, which Kream had done for years. The case contains no evidence of emotional and nervous strain during the bus driving. You will not find it in the duties of the employment, which were the same be-